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Copyright Royalty Board

37 CFR Part 385

[Docket No. 21-CRB-0001-PR (2023-2027)]

Determination of Rates and Terms for Making and Distributing Phonorecords (Phonorecords IV)

AGENCY: Copyright Royalty Board, Library of Congress.

ACTION: Proposed rule.

SUMMARY: The Copyright Royalty Judges publish for comment proposed regulations that set rates and terms applicable during the period beginning January 1, 2023, and ending December 31, 2027, for the section 115 statutory license for making and distributing phonorecords of nondramatic musical works.

DATES: Comments and objections, if any, are due no later than [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

ADDRESSES: You may send comments, identified by docket number 21-CRB-0001-PR (2023-2027), online through eCRB at <https://app.crb.gov>.

Instructions: To send your comment through eCRB, if you don't have a user account, you will first need to register for an account and wait for your registration to be approved. Approval of user accounts is only available during business hours. Once you have an approved account, you can only sign in and file your comment after setting up multi-factor authentication, which can be done at any time of day. All comments must include the Copyright Royalty Board name and the docket number for this proposed rule. All properly filed comments will appear without change in eCRB at <https://app.crb.gov>, including any personal information provided.

Docket: For access to the docket to read background documents or comments received, go to eCRB at <https://app.crb.gov> and perform a case search for docket 21-CRB-0001-PR (2023-2027).

FOR FURTHER INFORMATION CONTACT: Anita Blaine, CRB Program Specialist, at 202-707-7658 or crb@loc.gov.

SUPPLEMENTARY INFORMATION:

Background

Section 115 of the Copyright Act, title 17 of the United States Code, requires a copyright owner of a nondramatic musical work to grant a license (also known as the “mechanical” compulsory license) to any person who wants to make and distribute phonorecords of that work, provided that the copyright owner has allowed phonorecords of the work to be produced and distributed, and that the licensee complies with the statute and regulations. In addition to the production or distribution of physical phonorecords (compact discs, vinyl, cassette tapes, and the like), section 115 applies to digital transmissions of phonorecords, including permanent digital downloads and ringtones.

Chapter 8 of the Copyright Act requires the Copyright Royalty Judges (Judges) to conduct proceedings every five years to determine the rates and terms for the section 115 license. 17 U.S.C. 801(b)(1), 804(b)(4). Accordingly, the Judges commenced the current proceeding in January 2021, by publishing notice of the commencement and a request that interested parties submit petitions to participate. *See* 86 FR 25 (Jan. 5, 2021).

The Judges received petitions to participate in the current proceeding from Amazon.com Services LLC, Apple Inc., Copyright Owners (joint petitioners Nashville Songwriters Association International (NSAI) and National Music Publishers Association (NMPA)), Google LLC, George Johnson, Joint Record Company Participants (filed by Recording Industry Association of America, Inc. for joint petitioners Sony Music

Entertainment, UMG Recordings, Inc., and Warner Music Group Corp.), Pandora Media, LLC, David Powell, SoundCloud Operations Inc.,¹ Spotify USA Inc., and Brian Zisk.

The Judges gave notice to all participants of the three-month negotiation period required by 17 U.S.C. 803(b)(3) and directed that, if the participants were unable to negotiate a settlement, they should submit Written Direct Statements no later than September 10, 2021. On May 25, 2021, the Judges received a motion stating that several participants² had reached a partial settlement regarding the rates and terms under Section 115 of the Copyright Act, namely, for physical phonorecords, permanent downloads, ringtones, and music bundles for the 2023-2027 rate period and seeking approval of that partial settlement. *See Motion to Adopt Settlement of Statutory Royalty Rates and Terms for Subpart B Configurations*, Docket No. 21-CRB-0001-PR (2023-2027) at 1 (May 25, 2021) (Motion). The movants state that “the settlement represents the consensus of buyers and sellers representing the vast majority of the market for ‘mechanical’ rights for [the 37 CFR 385] Subpart B Configurations.”³ Motion at 4.

The settlement proposes that “Subpart B Configuration Rates and Terms presently set forth in 37 CFR part 385 Subpart B . . . continue to be applicable to the Record Company Participants and all other licensees of ‘mechanical’ rights in musical works for the Subpart B Configurations, for the rate period covered by the Proceeding, with only a few minor editorial changes to the applicable regulations.” Motion at 3.

The proposed editorial changes apply to §§ 385.10 and 385.11 of Subpart B and to two definitions in Subpart A and would clarify the regulations. For example, the definition of Licensed Activity needs to be changed to remove the reference to Subpart B

¹ SoundCloud Operations Inc. withdrew from the proceeding on May 21, 2021.

² The participants who filed the motion are the “Publisher/Songwriter Participants” (NMPA and NSAI) and the “Record Company Participants” (Sony Music Entertainment, UMG Recordings, Inc. and Warner Music Group Corp.). Motion at 1.

³ Participants Amazon.com Services LLC, Google LLC, Pandora Media, LLC, and Spotify USA Inc. do not object to the settlement, Motion at 4 n.2, however, the movants state that they understand that participant George Johnson intends to object to it. Motion at 4.

because the term Licensed Activity does not appear in Subpart B. *See* 37 CFR 385.2, 385.10-11; Motion at 6-7 (redline of regulations with rationale for changes).

Section 801(b)(7)(A) of the Copyright Act authorizes the Judges to adopt rates and terms negotiated by “some or all of the participants in a proceeding at any time during the proceeding” provided they are submitted to the Judges for approval. This section provides that the Judges shall provide notice and an opportunity to comment on the agreement to (1) those that would be bound by the terms, rates, or other determination set by the agreement and (2) participants in the proceeding that would be bound by the terms, rates, or other determination set by the agreement. *See* section 801(b)(7)(A). The Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants not party to the agreement if any *participant* objects and the Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates. *Id.*

If the Judges adopt rates and terms reached pursuant to a negotiated settlement, those rates and terms are binding on all copyright owners of musical works and those using the musical works in the activities described in the proposed regulations.

The Judges propose an additional minor revision to change an outdated cross reference. They propose to shorten the cross reference 17 U.S.C. 115(c)(3)(C) and (D) to 17 U.S.C. 115 because the section no longer has a subsection (c)(3). *See* 17 U.S.C. 115; Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. 115–264, 132 Stat. 3676, 3679-3684 (Oct. 11, 2018).

The Judges solicit comments on whether they should adopt the proposed regulations as statutory rates and terms relating to the making and distribution of physical or digital phonorecords of nondramatic musical works.

Comments and objections regarding the rates and terms and the minor revisions must be submitted no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE **FEDERAL REGISTER**].

List of Subjects in 37 CFR Part 385

Copyright, Phonorecords, Recordings.

Proposed Regulations

For the reasons set forth in the preamble, the Copyright Royalty Judges propose to amend 37 CFR part 385 as follows:

PART 385— RATES AND TERMS FOR USE OF NONDRAMATIC MUSICAL WORKS IN THE MAKING AND DISTRIBUTING OF PHYSICAL AND DIGITAL PHONORECORDS

1. The authority citation for part 385 continues to read as follows:

Authority: 17 U.S.C. 115, 801(b)(1), 804(b)(4).

Subpart A—Regulations of General Application

2. In § 385.2 revise the introductory text of the definition for “*Eligible Limited Download*”, the definition for “*Licensed Activity*”, and the fourth sentence for definition “*Sound Recording Company*” to read as follows:

§ 385.2 Definitions.

* * * * *

Eligible Limited Download means a transmission of a sound recording embodying a musical work to an End User of a digital phonorecord under 17 U.S.C. 115 that results in a Digital Phonorecord Delivery of that sound recording that is only accessible for listening for— * * *

* * * * *

Licensed Activity, as the term is used in subparts C and D of this part, means delivery of musical works, under voluntary or statutory license, via Digital Phonorecord

Deliveries in connection with Interactive Eligible Streams, Eligible Limited Downloads, Limited Offerings, mixed Bundles, and Locker Services.

* * * * *

Sound Recording Company means a person or entity that:

* * * * *

(4) Performs the functions of marketing and authorizing the distribution of a sound recording of a musical work under its own label, under the authority of a person identified in paragraphs (1) through (3) of this section.

Subpart B—Physical Phonorecord Deliveries, Permanent Downloads, Ringtones, and Music Bundles

3. Revise § 385.10 to read as follows:

§ 385.10 Scope.

This subpart establishes rates and terms of royalty payments for making and distributing physical phonorecords, Permanent Downloads, Ringtones, and Music Bundles, in accordance with the provisions of 17 U.S.C. 115.

4. Revise § 385.11 paragraph (a) to read as follows:

§ 385.11 Royalty rates.

(a) Physical phonorecords and Permanent Downloads. For every physical phonorecord and Permanent Download the Licensee makes and distributes or authorizes to be made and distributed, the royalty rate payable for each work embodied in the phonorecord or Permanent Download shall be either 9.1 cents or 1.75 cents per minute of playing time or fraction thereof, whichever amount is larger.

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Chief Copyright Royalty Judge.

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